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No. 22197

In the
United States Court of Appeals
For the Ninth Circuit

CASCADE EMPLOYERS' ASSOCIATION, INC., CORVALLIS SAND & GRAVEL CO., EUGENE SAND & GRAVEL CO., and WILDISH SAND & GRAVEL CO.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONERS' BRIEF

On Petition to Review Decision and Order of the
National Labor Relations Board

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No. 22197

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review Decision and Order of the National Labor Relations Board

PETITIONERS' BRIEF

JURISDICTIONAL STATEMENT

This is a petition for review of a decision of the National Labor Relations Board entered March 13, 1963, and an order remanding the case to the Board for consideration of Petitioners'[1] claim that the remedy granted by the Board for the Union's unfair labor practice was inadequate because it failed to require the Union to restore to the petitioning companies sums paid under illegally-coerced collective bargaining agree-

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[1] Petitioners are Corvallis Sand & Gravel Co., Eugene Sand & Gravel Co. and Wildish Sand & Gravel Co., all Oregon corporations, and Cascade Employers' Association, Inc., a nonprofit Oregon corporation (R 11-12, 93).

ments before the Board set them aside (R 84, 93). This Court has jurisdiction under 29 USC § 160(e) and (f).

STATEMENT OF THE CASE

The petitioning companies were part of a multi-employer bargaining unit which had a collective bargaining agreement with the respondent Union (Hoisting and Portable Engineers Local Union No. 701). The agreement expired on December 31, 1958, and the companies sought to bargain for a new contract through Petitioner Cascade Employers' Association, Inc. (Cascade), the successor to the unit representative which had negotiated the prior contract (R 24-25, 85).

These negotiations were followed by unfair labor practice proceedings before the Board, which found that the Union, in violation of § 8(b) (1) (B) and (3) of the Labor Management Relations Act, as amended, had restrained and coerced Corvallis, Eugene, Wildish and others in their selection of Cascade as their collective bargaining representative and had refused to bargain collectively with Cascade by seeking to break them off from the multi-employer unit which it represented (R 89).[2] It also found that by reason of the Union's pressure

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[2] Section 8(b) (1) (B) makes it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Section 8(b) (3) makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, * * *".

the three companies had executed individual contracts with the Union outside the bargaining unit (R 25-26).

The Board's final order directed the Union to cease and desist from the unlawful conduct, including coercion of employers represented by Cascade, and affirmatively to bargain with Cascade with respect to employees in the multi-employer unit and to post appropriate notices (R 90-91). In addition, it directed the Union to cease and desist from

> "Giving effect to the individual contracts which it executed with Corvallis, Eugene, and Wildish under the circumstances described in the original Intermediate Report, or any modification, continuation, extension, or renewal thereof." (R 90)

Thereafter, the petitioning companies commenced actions in the Oregon state court against the Union and the trustees of the Union's health and welfare and pension trust funds to whom money had been paid under the coerced agreements before the Board set them aside (R 95). The complaints alleged that the companies had paid substantial sums to the Union's members and the trustees under the contracts prior to the Board's decision setting them aside and sought restitution from the Union and the trustees of those sums.

The defendants demurred to the complaints, on the grounds that their subject matter was within the exclusive jurisdiction of the Board and that they failed to state facts sufficient to constitute a cause of action. The circuit court sustained the demurrers and dismissed the complaints, and the Supreme Court of Oregon affirmed (419 P2d 38), holding that they sought a remedy for an unfair labor practice, which was a subject matter within the exclusive jurisdiction of the Board. The Court suggested that the Board could order restitution by the Union of sums paid to its members under the illegal contracts.

> "If it was the Board's belief that the 'expunging' of the union's prior unfair labor practices required the union to make restitution of the additional money *paid its members*, the Board would so have ordered. * * * The Board's failure to order restitution indicates its belief that in this instance federal labor policy did not require it."[3] (419 P2d at 43; emphasis supplied)

As to petitioners' claims against the trustees, the Court said:

> "* * * Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for

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[3] It did not suggest that the Board could order the Union to restore money paid to the trustees.

> asserting that the trustees should be required to do so by a state court where no state law or policy is offended * * *." (419 P2d at 43)

Corvallis, Eugene and Wildish petitioned for certiorari to review the dismissal of their claims against the trustees, and represented to the Court therein that it had never before been held that such suits against third parties are pre-empted by LMRA or that the Union could be ordered to make restitution of sums paid to the trustees, and that Board orders cannot run against nonparties (such as the trustees) who are not agents of the Union or themselves guilty of unfair labor practices.[4]

On February 20, 1967 the Supreme Court entered an order requesting the Solicitor General to file a brief expressing the views of the United States (386 US 931). He did so, the brief, however, having been prepared by the Board.[5] The United States resisted the writ on the ground that reversal would recognize state jurisdiction "to supplement the remedial efforts of the National Labor Relations Board" (p 7), and that the Board

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[4] Petition, pp 6-8. A copy of the petition, certified by the Clerk of the United States Supreme Court, has been filed with the Clerk of this Court.

[5] A copy of the Board's brief, certified by the Clerk of the United States Supreme Court, has been filed with the Clerk of this Court.

had authority to order restitution from the Union of sums paid *to the trustees.* It stated:

> "* * * the assumption that the Board was powerless is mistaken. As the court below observed, the Board could have ordered reimbursement from the Union if it had determined that the illegality involved in procuring the contracts was so pervasive that it could only be cured by restoring to petitioners the health and welfare and pension contributions paid out under the contracts * * *." (p 12)

The cases cited by the Board for its far-reaching jurisdictional claim were either inapposite or were decided long after *Sand & Gravel* and could have given petitioners no help when their case was before the Board.[6]

The petition for certiorari was denied on May 15, 1967 (____ US ____, 18 L Ed 2d 622). Thereafter, this petition was filed, asking that the case be remanded to the Board for consideration of petitioners' claim that the appropriate remedy for the unfair labor practice should extend to requiring restitution by the Union of

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[6] In *Virginia Elec. & P. Co. v. N.L.R.B.*, (1943) 319 US 533 at 544 (employer required to reimburse employees for dues checked off to company-directed union) the court found that the union was the company's agent. In *Hod Carriers Union*, (1964) 150 NLRB 158 at 165-166, 181, 58 LRRM 1033, the union itself had received the money. The only decisions cited by the Board granting restitution by the Union of money paid independent third parties were decided after this case. *Plasterers Union*, (1964) 149 NLRB 1264 at 1268-1269, 57 LRRM 1448; *Plasterers' Union*, (1966) 157 NLRB 823, 61 LRRM 1447. None were cited suggesting that LMRA pre empts claims against third parties.

all or part of the sums claimed in the state court actions which it has now been held were pre-empted by LMRA.

QUESTIONS PRESENTED

1. Should the Court remand the case to the Board to determine whether petitioners should be reimbursed by the Union for sums paid by petitioners to other persons as a consequence of contracts illegally coerced by the Union in violation of §§ 8(b) (1) (B) and 8(b) (3) of the Labor Management Relations Act?

2. Is this petition barred under § 10(e) of the Act by petitioners' failure to claim such relief before the Board?

STATUTE INVOLVED

Section 10(e) and (f) of the Labor Management Relations Act of 1947 (29 USC § 160(e) and (f)) provide (in material part):

> "(e) * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *
>
> "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such

> person resides or transacts business, * * *. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, * * *."

SPECIFICATION OF ERROR

The Board failed to consider whether the remedy for the unfair labor practice which it found should include restitution by the Union of sums paid by the petitioning companies under the illegal contracts prior to the Board's decision, and the case should be remanded for such consideration.

SUMMARY OF ARGUMENT

The decision that petitioners' claims for restitution are pre-empted creates a grave and unanticipated injustice which the Board should have an opportunity to remedy. Under the circumstances of this case, petitioners' claims did not have to be asserted in the proceedings before the Board under § 10(e) of LMRA, and if there was such a requirement, it was excused by extraordinary circumstances present in the case. The case should be remanded to the Board for consideration of petitioners' claim.

ARGUMENT

1. Petitioners will be denied substantial relief necessary to remedy the Union's unlawful conduct if they are not permitted to raise the matter before the Board.

The Union, by unlawful coercion and in violation of §§ 8(b)(1)(B) and 8(b)(1)(3) of the Act, separated the petitioning companies from their lawful bargaining unit and forced them to accept separate contracts under which payments were made to independent trustees of the union health and welfare and pension trust funds and to the employee members of the Union. The Board prohibited the Union from giving further effect to the illegal contracts, and the companies proceeded against the Union and the trustees in state court to recover the money. Only in the course of that litigation did the Board's position emerge that the Board — and only the Board — was empowered to grant any relief, even from the trustees, who were not parties to the Board proceeding or subject to its jurisdiction.

Injuries caused by gross unlawful conduct should not go unremedied. The rapid growth of the pre-emption doctrine, and the resulting progressive unavailability of relief in more and more cases from any source except the Board, should not leave litigants without a forum in which to seek redress when it is determined for the first time that none is available in the courts.

This petition is an effort to avoid such unfairness. Petitioners cannot reopen the Board proceeding without the aid of this Court, and, of course, if that aid is given, it is not in the least certain that the Board will choose to order the Union to reimburse petitioners for the payments unlawfully extracted from them. Petitioners ask only that the Court give them an opportunity to make their claim in the only forum that — under present law — is available for redress.

2. Petitioners' claim was not waived by the failure of Cascade to assert it before the Board.

Petitioners' contention that the Board, in framing a remedy for the Union's unfair labor practice, should have awarded restitution from the Union of some or all of the sums in question, admittedly was not asserted during the administrative proceeding, in which the dominant issue was whether Cascade was the proper bargaining representative of its members. That proceeding, however, took a curious course which illustrates why it was not.

On September 8, 1960 the Trial Examiner rendered an Intermediate Report finding that the Union had violated § 8(b)(1)(B) and § 8(b)(3) of the Act and recommended that it be ordered to bargain and to cease giving effect to the individual contracts which it had coerced from the petitioning companies (R 23). On July

31, 1961 the Board reversed the Trial Examiner's findings and dismissed the complaint on the issue of Cascade's status as the bargaining representative of the unit (R 64). The General Counsel and the charging party moved for reconsideration (R 67, 69); their motions were allowed, and the case was remanded to the Trial Examiner for additional evidence "on the unit issue" (R 71). After taking additional evidence, the Trial Examiner rendered a Supplemental Intermediate Report on June 28, 1962 recommending dismissal of the complaint on the basis previously assigned by the Board (R 74). The charging party filed exceptions (R 79), and the Board in a Supplemental Decision dated March 13, 1963 reversed the Trial Examiner and held that Cascade was a proper bargaining representative and that the Union had violated § 8(b)(1)(B) and § 8(b)(3) of the Act (R 84).

From this history, it follows that the only point in the proceedings at which the present question could have been raised was during the appeal to the Board from the Trial Examiner's first decision of September, 1960. Section 10(e) of the Act does not apply to the second review proceeding, because the Trial Examiner recommended dismissal, and the question of the appropriate remedy was created only by the Board's final decision which reversed his findings. The Act does not require a petition for rehearing in such cases as a condition to consideration of petitoners' claim by this Court.

> "* * * Procedural fairness prohibits foreclosure of consideration of the question. * * *" *N.L.R.B. v. Richards*, (CA 3 1959) 265 F2d 855 at 862

Nor is Cascade's failure to raise the matter in the original appeal to the Board significant. The Board's decision to dismiss the complaint foreclosed any consideration of the appropriate remedy, including any exception relating to its scope. Furthermore, the joint propositions that relief was available through the Board from the Union, but not through the courts from those to whom the money had been paid, lay in the future (see p 6 above).

Petitioners do not seek substantive relief in this Court, but only to have the case remanded for consideration of their claim that the remedy should extend to restitutional relief. In *N.L.R.B. v. Glass,* (CA 6 1963) 317 F2d 726, an enforcement proceeding, the Board relied on § 10(e) in opposing a petition to remand for evidence justifying the discharge of an employee. No exception had been taken by the respondent to the Trial Examiner's ruling excluding the evidence. The Court held that it had discretionary power to grant the requested relief and remand for further proceedings "* * * even though objections to the Board's order were not properly made" (317 F2d at 727). This petition is entitled to equal treatment.

3. Cascade's failure to assert these claims before the Board was the result of extraordinary circumstances, and the Court can consider the petition under § 10(e).

If § 10(e) is applicable to the case at all, extraordinary circumstances exist which account for Cascade's failure to raise the question before the Board and justify the Court's consideration of the petition. For it was only in the course of the proceedings in the Oregon courts and in the United States Supreme Court that it became established that judicial relief against independent third parties who receive money under unlawfully coerced contracts is pre-empted by LMRA, and it was only in Board cases decided long after this one that it was held that relief is available from the Union with respect to such payments (see p 6 above). This is not a case in which petitioners merely mistook their remedy — it is one in which they could not know that their choice to proceed in state court was barred — or even that the Board remedy was available to them — until long after their right to avail themselves of it had expired.

The cases support a finding of extraordinary circumstances on this record. In *N.L.R.B. v. Lundy Manufacturing Corporation,* (CA 2 1960) 286 F2d 424 the Trial Examiner found that there had been an unfair labor practice, relying on evidence which he received on the authority of a precedent which was thereafter reversed by the Supreme Court. In a subsequent enforcement proceeding, the Board contended that under 10(e) the point was not available to the respondent, because it had not been urged before the Board. The Court said:

> "We are not persuaded by the Board's contention that respondent is precluded from seeking to avail itself of the reversal in Local Lodge because of alleged failure to urge the point before the Board, § 10(e), 29 U.S.C.A. § 160(e). Respondent consistently argued the validity of the 1957 contract; it is not fatal that respondent did not include among its arguments a specific criticism, necessarily futile at that stage, of a pertinent Board decision which had been enforced by a Court of Appeals. * * * Moreover, *even if nothing had been said*, the case would surely be one where 'the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' § 10(e), 29 U.S.C.A. § 160(e)." (286 F2d at 426; emphasis supplied)[7]

The Supreme Court has held that it is appropriate to remand in cases where circumstances arise after the Board's order which may affect the propriety of enforcing it. *NLRB v. Jones & Laughlin Steel Corporation*, (1947) 331 US 416 at 427. The same principle is applicable to this case.

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[7] See also *Saratoga Harness R. Ass'n v. New York State L. R. Bd.*, (1958) 177 NYS 2d 401 at 403, 6 AD 2d 329, aff'd (1959) 6 NY 2d 960, 191 NYS 2d 161, 161 NE 2d 388.

Finally, the unusual course of the proceedings below and the parties' pre-occupation with the operation of the bargaining unit understandably clouded the question of the scope of the remedy. In *National Labor Relations Board v. Spiewak,* (CA 3 1949) 179 F2d 695 at 701-702 the Board objected to the sufficiency of an employer's exceptions to raise the question of its reasons for a refusal to re-employ. The Court held that if the exceptions were insufficient, the circumstances fell within the exception § 10(e):

> "* * * The Spiewak reasons for denying re-employment to the six were developed on the Board's own cross-examination. *The full significance of that testimony was apparently lost sight of by both sides in the dispute over whether the employer could rely on the 1944 contract for the refusal to take back the six.* They failed to see the trees for the forest. The fact that respondents did not rehire the six because of employee opposition is vital to this branch of the litigation, and, in fairness to all concerned, cannot be disregarded." (179 F2d at 702; (emphasis supplied)[8]

4. The Court should remand the case to the Board.

The Court should exercise its discretion to remand the case to the Board to consider petitioners' claim. The Board's decision established that the contracts under

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[8] See also *International Ladies' Garment Workers' Union v. N.L.R.B.,* (1964) 339 F2d 116 at 121: § 10(e) inapplicable because the failure to except was not a part of a "deliberate strategy" and did not prejudice the Board's case.

which the money was paid were illegally coerced by the respondent Union. So far as petitioners were concerned —and very likely so far as the Act is concerned, as well —barring their further performance was only part of a remedy. The petitioning companies paid money under the contracts which it now develops cannot be recovered in judicial proceedings from those to whom it was paid. The Board should at least address itself to the question whether additional relief is desirable to remove the effects of the unfair labor practice.

In the Board's brief filed with the United States Supreme Court, it suggested considerations which might lead it to deny such relief. There are others which suggest a contrary conclusion: The obvious unfairness of protecting payments to third persons under contracts which have been illegally coerced; the danger of promoting contract provisions calling for initial balloon payments to third persons; and the history of intransigence and illegal conduct of this Union.

We cannot, of course, anticipate the Board's decision. The present question is whether the Court should remand the case so that the Board can make one. The Board's expertise should be brought to bear on a problem created by its assertion of a new and expanded jurisdiction, and as to which those subject to its jurisdiction require instruction. See *Burinskas v. N.L.R.B.*, (CA DC 1966) 357 F2d 822 at 827.

CONCLUSION

The petition for review should be granted, and the case should be remanded to the Board to consider petitioners' claim.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

NO. 22197

In the
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CASCADE EMPLOYERS' ASSOCIATION, INC., CORVALLIS SAND & GRAVEL CO., EUGENE SAND & GRAVEL CO., and WILDISH SAND & GRAVEL CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701,

Intervenor-Respondent.

FILED
MAR 26 1968
WM. B. LUCK, CLER

BRIEF OF INTERVENOR-RESPONDENT, HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701

On Petition to Review Decision and Order of the National Labor Relations Board

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MAR [illegible] 1968

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TABLE OF CASES

JURISDICTIONAL STATEMENT

Petitioners rely upon 29 USC 160 (f) to support the jurisdiction of this Court. The National Labor Relations Board, original Respondent herein, admits the jurisdiction of this Court (Answer, par. 1). The Intervenor-Respondent, by its answer, admits the jurisdictional allegations of the Petitioner (par. 1 of Answer).

However, the Petition to review and modify an order of the National Labor Relations Board, hereinafter the Board, which was made on March 13, 1963, was not filed in this Court until more than four years thereafter, on September 19, 1967. These facts alone pose a serious question whether this Court should decline, in its discretion, to exercise a conceded jurisdiction thus tardily invoked.

SUPPLEMENTAL STATEMENT OF THE CASE

Intervenor-Respondent, hereinafter the Union, accepts the Statement of the Case made in Petitioners' Brief (pp. 2-7) insofar as the Statement confines itself to facts. The inferences from facts and the legal consequences of those facts are contested.

Both the Board and the Union seek this Court's dismissal of the Petition to review and modify, and for

essentially the same reasons. As original Respondent in the Board case, any practical consequences of a re-opening of this aged controversy will adversely affect the Union.

The individual companies Petitioners before this Court would be the immediate financial beneficiaries of any "restitution" order the Board might make, if it be assumed that on remand from this Court the Board should reverse itself and conclude that the affirmative action of "restitution" would be a practical and necessary effectuation of the policies of the National Labor Relations Act. Those companies were the parties plaintiff in the Oregon state court proceedings. The Union was a party defendant. The judgment of the Supreme Court of Oregon, affirming the trial court's dismissal on demurrers, stands effective as between those individual Petitioners and the Union. Among the findings and conclusions expressed in the Opinion of the Supreme Court of Oregon (419 P2d 38) are the following:

> "The determination of the relief to which a party to a collective bargaining agreement may be entitled, where the agreement was obtained by unfair labor practices, is sufficiently important in the regulatory process as to be within the sole province of the Board..."
>
> (419 P2d at 42)

> "If it was the Board's belief that the "expunging" of the union's prior unfair labor practices required the union to make restitution of the additional money paid its members, *the Board would have so ordered*..."

(Emphasis supplied. 419 P2d at 43)

*****

> "...The restitution of money paid as a result of a contract entered into because of unfair labor practices would certainly come within '***such affirmative action***as will effectuate the policies of [the National Labor Relations Act]***' ****_The Board's failure to order restitution indicates its belief that in this instance federal labor policy did not require it._"

(Emphasis supplied. 419 P2d at 43)

The Oregon litigation involved an issue raised by the demurrers which was not passed upon by the Supreme Court of Oregon. One ground of demurrer was "that the complaint did not state a cause of suit because it showed plaintiffs sought, obtained and accepted relief from the Board without asking for the relief sought by the present suits." (419 P2d at 41) The Supreme Court disposed of the case on the preemption issue and did not reach the question whether Petitioners were precluded from seeking restitution because of their failure to request that relief from the Board. Petitioners' Brief concedes this failure(pp.10-13)

ADDITIONAL QUESTIONS PRESENTED

1. Are the individual Petitioners barred from the relief they request from this Court by the Oregon adjudication against them, and in favor of Intervenor-Respondent?

2. Is Cascade, as a representative for purposes of collective bargaining of the individual Petitioners, barred from the relief requested from this Court by the doctrine of collateral estoppel by judgment of the Oregon Supreme Court?

SUMMARY OF ARGUMENT

1. The Union stands in substantially the position of the Board in respect to the issues raised by the Petition and the Board's Answer involving (a) the failure of Petitioners to request of the Board the relief for which remand is sought, and (b) the suitability of the relief sought tested by its effectuation of the public policies of the National Labor Relations Act, particularly so long after the unfair labor practices and the Board's closing of the case. This Brief will therefore adopt the substance of the Board's contentions on those issues, without burdening this Court with another version of the argument against the Petition on those issues.

2. The Oregon Supreme Court's findings and conclusions, quoted in the Supplemental Statement of

the Case (pp. 2,3,infra), and its judgment based thereon, are final and binding as to those Petitioners' claims against the Union for "restitution." The individual Petitioners failed to request Certiorari as against the Union. They can neither attack the Oregon judgment nor relitigate in this Court and before the Board the findings and conclusions of the Oregon Court.

3. The Association, hereinafter Cascade, is merely a collective bargaining representative of the individual Petitioners, and it is thus barred by the Oregon judgment, and the findings and conclusions upon which that judgment is founded, because Cascade is in privity withthe individual Petitioners. In any event, Cascade is only an agent for the individual Petitioners in seeking a remedy which would eventuate in "restitution" to the sand and gravel operators, and the equitable doctrine of collateral estoppel by judgment applies to bar Cascade's Petition.

ARGUMENT

I.

The Individual Companies Petitioner are Barred From the Relief They Ultimately Seek Against the Union by the Judgment of the Oregon Supreme Court.

The immediate relief sought by the Petition is that this Court should remand this case to the Board.

But the Petition (p. 5) asks a direction that the Board thereupon "decide if petitioners are entitled to restitution against the Union as an additional remedy for the unfair labor practices which it found."

These individual sand and gravel companies sought precisely that relief against the Union in their Oregon complaints (419 P2d 39-"The relief sought is rescission of the agreements, restitution of the sums paid thereunder,..."). The final judgment of the Oregon Supreme Court is determinative of their right to "restitution" despite their now seeking that remedy in another forum or forums. Southern Pacific R. Co. v. United States, 168 U.S. 1, 48,49, 18 S. Ct. 1827, 42 L ed 355, 377; United States v. Munsingwear, 340 U.S. 36, 71 S. Ct.104, 95 L ed 36.

This case concerns unfair labor practices which took place from May to August 1959. The Board decision and order, with which the Union complied, was dated March 13, 1963. The Oregon trial court judgment against the individual Petitioners and in favor of the Union was entered September 9, 1965. The Supreme Court of Oregon rendered its Opinion on October 12, 1966. The instant Petition was filed September 19, 1967. "The case illustrates not the hardship of res judicata but the need for it in providing terminal points for Litigation." Mr. Justice Douglas in Munsingwear, supra,p.41.

II.

The Findings and Conclusions of the Oregon Supreme Court are Likewise Binding Against the Individual Petitioners. By Finding That Specific Affirmative Actions, Coupled With Compliance With Cease And Desist Requirements, Would Effectuate the Policies of the Act, the Board Determined That Those Policies Did Not Require "Restitution." The Oregon Supreme Court Supported That Determination.

The requirements of the Board's Order against the Union are adequately summarized on page 3 of Petitioners' Brief. Subsequent to the Order the three sand and gravel operators commenced their Oregon litigation. The complaints were bottomed upon the Board's findings of unfair labor practices (419 P2d 40). The Board had concluded in its Decision and Order that the requirements of the Order would effectuate the policies of the National Labor Relations Act.

With the Board's Decision and Order before it, the Supreme Court of Oregon explicitly concluded that if the Board believed "restitution" necessary to the public policy it enforces "the Board would have so ordered." The Court also specifically found that: "The Board's failure to order restitution indicates its belief that in this instance federal labor policy did not require it."

These findings and conclusions were points on which that Court found it [illegible] to pronounce judgment and points which [illegible] belonged to the subject of the contro[illegible]

which the parties presented and points on which the Court found itself required to promounce judgment. Woods v. Cannady, 158 F2d 184. These facts, thus established in the earlier litigation, are conclusively established in this subsequent proceedings between the parties. The Evergreens v. Nunan, 141 F 2d 927, cert. den. 323 U.S. 720, 65 S. Ct. 49, 89 L ed 579; Alexander v. C.I.R., 224 F 2 788. These rights, facts and matters at issue were both necessarily involved and directly adjudicated on their merits by the highest Oregon tribunal. They cannot again be litigated between the same parties, even though the precise subject matter of the litigation now pending is not the same. The ultimate purpose is the same, and the findings and conclusions relied upon by the Union would necessarily be ignored if that purpose is to be achieved. Re California Lumber Corp., 227 F Supp 63; Gaitan v. U.S., 295 F2d 277, cert. den. 369 U.S. 857, 82 S. Ct. 939, 8 L ed2d 15.

III.

Cascade is a Corporate Association, "Representative of the Individual Company Petitioners, Bound by the Oregon Findings, Conclusions and Judgments.

Cascade filed the original charges of unfair labor practices as representative of Eugene, Corvallis and Wildish Sand and Gravel Companies. These three firms

would be the ultimate and direct beneficiaries of any ultimate order of "restitution" which the Board might enter. The incidental fact that Cascade is now a Petitioner in this Court of Appeals proceeding should not dilute the effect of the previous adjudication against the remedy of "restitution. It is plain that Cascade is equally barred with the individual Petitioners, whether upon the strict doctrine of privity or because of collateral estoppel by judgment.

Cascade, as the agent of the individual Petitioners cannot have any greater right to attack the Union before this Court than the individual Petitioners have. The principals being barred from asserting their claim to the relief of "restitution", their agent cannot press that claim on their behalf.

CONCLUSION

For the reasons expressed in this Brief, as well as those reasons urged by the Board's Brief, and adopted in substance by the Union, the Petition should be dismissed. At this point Petitioners' stale claim for "restitution" deserves judicial burial.

Respectfully submitted,

Clifford D. O'Brien

Portland, Oregon
March 25, 1968

CLIFFORD D. O'BRIEN
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Hoisting & Portable Engineers, Local 701

CERTIFICATE OF COUNSEL

I, Clifford D. O'Brien, Attorney for the Intervenor-Respondent herein, hereby certify that in connection with the preparation of the foregoing Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Clifford D. O'Brien
CLIFFORD D. O'BRIEN